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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
I. THE QUESTION OF WHETHER THE COMPLETION OF PROPERLY INVOKED GRIEVANCE-ARBITRATION PROCEDURES FIXES THE BEGINNING OF THE RUNNING OF TIME LIMITS FOR FILING OF AN EEOC CHARGE BY A DISCHARGED EMPLOYEE IS BEFORE THIS COURT ...	1
II. TOLLING DURING THE PENDENCY OF PROPERLY INVOKED GRIEVANCE-ARBITRATION PROCEEDINGS IS NECESSARY TO EFFECTUATE THE CONGRESSIONAL INTENT	2
A. The Economic Power of a Union Representing All Employees in the Unit in Support of a Grievance Processed Through a Collectively Bargained Grievance-Arbitration Procedure Is Often More Effective Than Administrative or Judicial Proceedings	5
B. Employers Have a Stake in Resolution of Discrimination Issues Through the Grievance-Arbitration Procedures	11
C. Since All Time Limits for Processing of Grievances Depend on the Consent of the Employer, the Employer Can Prevent Long Drawn Out Grievance and Arbitration Procedures	13
D. Guy's Grievance Alleging "Unfair Action" by Robbins & Myers Is Broad Enough to Raise the Issue of Any Departure From Equality, Including Discrimination Because of Race	14
E. Since Procedural Issues Equally With Substantive Issues Arising in Connection With the Processing of a Grievance Are Properly for Decision by the Arbitrator Unless Expressly Excluded, the Long Delays for Court Proceedings Upon Which Robbins & Myers Relies to Militate Against Tolling Are a Rarity, Except for Employers Who Resist Arbitration	15
CONCLUSION	16

CITATIONS

	Page
CASES:	
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	11
American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974)	3
Burnett v. New York Central R.R., 380 U.S. 424 (1965)	3, 4
Minnesota Mining v. N. J. Wood Co., 381 U.S. 311 (1965)	3, 4
United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960)	15, 16
United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960)	15, 16
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960)	15, 16
MISCELLANEOUS:	
Arbitration Awards in Discharge Cases, 28 LA 930 (1957)	6
Bureau of National Affairs, Collective Bargaining Negotiations and Contracts, Basic Patterns of Union Contracts, 8th Ed., 1975, pp. 32-33	9
Bureau of National Affairs, Daily Labor Report No. 98, p. E-1 (May 19, 1976)	11
Bureau of National Affairs, Daily Labor Report No. 112, p. A-12 (June 9, 1976)	11
Davis and Pati, Elapsed Time Patterns in Labor Grievance Arbitration: 1942-1972, 29 ARB Journ. 15 (March 1974)	9
Elkouri and Elkouri, How Arbitration Works, 3rd Ed. 1924, pp. 643-644	14
Government Accounting Office Rept. on EEOC, EEOC Has Made Limited Progress in Eliminating, Employment Discrimination, reprinted Bureau National Affairs, Daily Labor Report No. 191, p. D-1, at p. D-4, Sept. 10, 1976	7, 9, 10

	Page
Hammerman and Rogoff, How To Live With Title VII: An Opportunity for Unions, 2 Employee Relations Law Journ. 19 (1976)	12
Holly, The Arbitration of Discharge Cases: A Case Study, Critical Issues in Labor Arb., Proceedings of the Tenth Annual Meeting, Nat'l Academy of Arb. (Bureau of National Affairs, Washington, D. C. 1957, p. 5)	6
McDermott and Newhams, Discharge-Reinstatement: What Happens Thereafter, 24 Ind. & Lab. Rel. Rev. 526 (1971)	7
Meltzer, Labor Arb. and Overlapping and Conflicting Remedies for Employment Discrimination, 39 Univ. of Chic. Law Rev. 30, 50 (1971)	8
Ross, The Arb. of Discharge Cases: What Happens After Reinstatement, Critical Issues in Labor Arb. Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators (Bureau of National Affairs, Wash., D.C. 1957, pp. 21-58)	6
Summary of Findings of a Study Reinstatement Under the National Labor Relations Act, printed hearings before the Special Subcommittee on Labor of the Committee on Education and Labor of H.R., 90th Cong., 1st Sess., on H.R. 11725, pp. 3-12 (GPO 1968)	7

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**I. THE QUESTION OF WHETHER THE COMPLETION OF
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THIS COURT**

The courts below (Pet. App. 3a-7a, 27a-29a) both
fixed the date of the "discriminatory event" (Pet.
App. 24a, 27a) which began the running of the statute

of limitations as the date upon which Guy was initially discharged rather than the date upon which she received the final decision of the employer at the third step of the grievance procedure which informed her of the grounds on which she was discharged (App. 18a-19)a. The first of the questions presented set forth in the IUE's petition (p. 2) focused on whether the requisite time period was "calculated from the final denial of a grievance properly pursued under a collective bargaining agreement in force".

In the companion case, No. 75-1276, Guy's first question presented (Pet. Br. No. 75-1276, p. 3) is "Whether the limitation period for filing a charge with the EEOC begins to run from the final decision of a company after the completion of grievance-arbitration proceedings, or from the Company's initial decision prior to the commencement of those proceedings".

For these reasons Robbins & Myers, Inc. is not correct when it argues that this Court can not properly decide whether the running of the statute of limitations begins at the exhaustion of the grievance procedure rather than at the time of discharge (Res. Br. 31).

II. TOLLING DURING THE PENDENCY OF PROPERLY INVOKED GRIEVANCE-ARBITRATION PROCEEDINGS IS NECESSARY TO EFFECTUATE THE CONGRESSIONAL INTENT

Robbins & Myers in its restatement of the questions presented (Br. p. 2) contends that the ninety day limitation period imposed by Title VII for the filing of charges is "jurisdictional". This contention is based on the fact that Title VII in creating a new right also, as part of the same statute, imposed the ninety day limitation on the filing of charges (Res. Br. pp. 17-18).

In our main brief (pp. 28-29) we showed that this is the same argument as was rejected by this Court in *Burnett v. New York Central RR.*, 380 U.S. 424, 427-428 (1965) and *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 559 (1974).

Likewise, Robbins & Myers (Br. pp. 17-25) views the tolling doctrine as limited to concepts of waiver and equitable estoppel. While it is true that *Burnett* and *American Pipe* held that, where appropriate, the equitable doctrine of tolling would be applied, tolling principles are not limited to waiver and estoppel.

This Court has held that tolling may serve a variety of different purposes and has refused to decide the applicability of tolling on the basis of technical rules such as those urged by Robbins & Myers (Res. Br. pp. 13-31). In *Minnesota Mining v. N. J. Wood Co.*, 381 U.S. 311 (1965) a statutory provision in the Clayton Act tolled the running of the statute of limitations against private litigants during the pendency of civil or criminal suits by the government. This Court held that the running of the statute should also be tolled during the administrative proceedings by the Federal Trade Commission. The Court reached this conclusion because to so hold served the congressional intent to use tolling as a device to make available to private litigants the development of evidence and legal theories by the government. Although this Court stated that "the record of the 1914 legislative proceedings reveals an almost complete absence of discussion on the tolling problem" (381 U.S. at p. 320) and that "the precise language * * * does not clearly encompass Commission proceedings" (381 U.S. at p. 321), the Court adopted the tolling principle which it believed effectuated the congressional purpose.

This Court in the *Minnesota Mining* case did not apply the rule of *expressio unius est exclusio alterius* on which Robbins & Myers relies (Res. Br. p. 11). Nor was this Court concerned with the fact that the FTC proceedings were independent and alternate to the suit of the private litigants and that the private litigants could have instituted their own suit at any time without regard to whether the FTC proceedings had been begun, were in progress or had been completed. Thus tolling there did not depend on whether there were separate alternate remedies, a test relied upon by Robbins & Myers (Res. Br. pp. 13-16).

Rather in the *Minnesota Mining* case this Court deemed controlling the fact that only by tolling during administrative proceedings by the Federal Trade Commission would the policy of enabling private litigants to have their evidence gathered for them by the government be served. As in *Burnett v. New York Central R.R.*, 380 U.S. 424, 427 (1965), to which this Court referred (381 U.S. at p. 321) and upon which we relied in our main brief (pp. 27-29, 41, 44), "the pivotal question for determination" was

" '[W]hether congressional purpose is effectuated by tolling the statute of limitations in given circumstances?' In order to determine that intent, we must examine 'the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act' *Ibid.*" 381 U.S. at p. 321.

We developed fully in our main brief (pp. 27-41), and will not repeat here the basis for concluding that the intent of Congress to promote to the fullest extent the effectuation of non-discrimination by voluntary agreement and conciliation can only be served by toll-

ing the limitations provisions of Title VII during pendency of properly invoked grievance-arbitration procedures.

Central to our tolling argument is our view that the test is whether tolling is essential to facilitate settlement of discrimination by the procedures of collective bargaining and grievance and arbitration. In judging whether tolling furthers this congressional purpose, consideration of whether remedies are concurrent and alternative is immaterial. The proper focus is on the effect of tolling or not tolling on the achievement of non-discrimination through methods of private self help. Robbins & Myers has, in its brief (pp. 20-31), taken issue with the factual basis of our presentation of the manner in which tolling during the pendency of grievance-arbitration procedures furthers the purpose of Title VII. Robbins & Myers, as we shall show hereinafter, is not accurate with respect to the manner in which the grievance-arbitration procedures function.

A. The Economic Power of a Union Representing All Employees in the Unit in Support of a Grievance Processed Through a Collectively Bargained Grievance-Arbitration Procedure Is Often More Effective Than Administrative or Judicial Proceedings

Where an employee elects to pursue a remedy for discrimination violative of Title VII, by asking his or her duly recognized collective bargaining representative to represent him or her by processing a grievance on his or her behalf, the employee is resorting to a procedure which has a history of success unparalleled by judicial or administrative proceedings. Before correcting inaccurate conceptions of the grievance arbitration procedure appearing in respondent's brief (pp. 20-25), we wish to stress that any employee who has

doubts as to whether the type of discrimination suffered will be attacked by the union, can, of course, ignore the union and go directly to the EEOC. Similarly, any employee who asks the union to handle the discrimination grievance may, at any time, irrespective of the stage which the grievance has reached, including a final arbitration award, go to the EEOC, assuming only that he or she has not lost his or her right by a failure to toll the limitations period.

Historically, the grievance-arbitration machinery established by collective bargaining agreements has supplied a relatively speedy, cheap and effective remedy to employees alleging an unfair discharge. Studies of the arbitration of discharge cases show that during the years 1942-1956, arbitrators found the discharge improper in approximately 58 per cent of the cases.¹ The majority of employees who were found to have been improperly discharged were reinstated by their employers and made good on their jobs. A study in 1957 of 753 awards issued 1950-1955 finding improper discharge, showed that 90 per cent of the employees were reinstated, and a year later 70 per cent were still working.² Another study in 1971 of 53 employees showed that only 5 did not return, only 3 were discharged a second time, and management rated the

¹ 61% from 1942-1951 and 54% from 1951-1956. Arbitration Awards in Discharge Cases, 28 LA 930 (1957); Holly, "The Arbitration of Discharge Cases: A Case Study", Critical Issues in Labor Arbitration, Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators (Bureau of National Affairs, Washington, D. C. 1957) p. 5.

² Ross, "The Arbitration of Discharge Cases: What Happens After Reinstatement," Critical Issues in Labor Arbitration, op. cit., pp. 21-58.

subsequent performance of the reinstated employee as good in 60 per cent of the cases.³

These figures are to be contrasted with the results achieved by the EEOC and NLRB. A computer print out prepared by EEOC for Professor A. W. Blumrosen, Rutgers Law School, showed that for fiscal year 1975, EEOC dismissed 15,799 charges of discharge alleging race discrimination and negotiated "successful settlements" of only 590 charges alleging discharge because of race. In 11,619 of charges of discharge for race the EEOC found no cause.

The Government Accounting Office study of EEOC shows that of 98,135 charge resolutions July 1, 1972 to March 31, 1975, only 10.9 per cent were reported as cause findings resulting in successful negotiated settlements.⁴ How many of these "successful settlements" involved hiring or reinstatement and how many resulted in permanent employment is not disclosed. We cited in our main brief, p. 33 fn. 27, a study made of the NLRB's New England regional office from July 1, 1962 to July 1, 1964, showing that of 194 employees whom the NLRB found had been unlawfully discharged, only 85 actually returned to work and only 25 kept their jobs.⁵ We know of no comparable study

³ McDermott and Newhams, Discharge-Reinstatement: What Happens Thereafter, 24 Ind. & Lab. Rel. Rev. 526, 537 (1971).

⁴ Government Accounting Office Report on EEOC titled "EEOC Has Made Limited Progress in Eliminating Employment Discrimination", reprinted BNA's Daily Law Report No. 191, p. D-1, at p. D-4, September 10, 1976.

⁵ Summary of Findings of a Study of Reinstatement Under the National Labor Relations Act, printed Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor of House of Representatives, 90th Cong., 1st Sess., on H.R. 11725, pp. 3-12 (GPO 1968).

of arbitration cases involving discrimination allegedly violative of Title VII. However, Professor Meltzer⁶ offers as a "plausible hypothesis" for the relatively few reported cases in which arbitration awards have been challenged in Title VII proceedings

"that arbitrators have, on the whole done a good job of finding employment discrimination when it existed or, at least, of convincing grievants, their lawyers, and the EEOC that claimed discrimination did not exist or could not be proved. That hypothesis, if validated, would suggest that arbitrators have risen above the institutional limitations I have emphasized and have by their integrity and craftsmanship achieved a pleasing kind of finality—finality without compulsion of law. Perhaps the prospect of an independent judicial check has contributed to that result by making all participants in arbitration more sensitive both to the special problems of grievances that overlap with Title VII and to the importance of the goal of that Title. In any event, * * * the grievance-arbitration process is likely to remain an important weapon against employment discrimination, and arbitrators are likely to continue to play an important role in advancing the national goal of equal employment opportunity."

The relative speed of grievance-arbitration procedures as compared with administrative and judicial proceedings is equally striking. The time specifications in the collective bargaining agreement between IUE and Robbins & Myers, under which Guy processed her grievance, are typical. Step 1 specifies that after an employee presents a grievance the foreman must

⁶ Meltzer, "Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination," 39 Univ. of Chic. Law Rev. 30, 50 (1971).

answer within 24 hours. If the answer is unsatisfactory the steward then presents a written grievance which must be answered in writing by the foreman the following work day. Unless appealed to the Second Step within 4 work days, the grievance is considered as settled. At Step 2 a meeting between the General Foreman and union representatives must be held within one week after the appeal from Step 1. If not settled in 24 hours after the meeting, the grievance must be appealed within 4 days. At the Third Step the Company must give an answer within 10 work days. After the final decision in Step 3, the Union has 10 days within which to invoke arbitration (App. 35a-38a). The maximum time between the grievance and invoking of arbitration is 31 days. Guy was discharged October 25, 1971 (App. 17a). The Company's final answer at Step 3 was dated November 18, 1971 (App. 17a, 18a-19a), a total elapsed time from the discharge to third step answer of 21 days.

Contrary to respondent (Br., pp. 20-23), more than 90 per cent of collective bargaining agreements contain similar time limitations.⁷

Where the grievance goes to arbitration a longer period is involved. The average elapsed time from grievance date to award date for 1971-1972 was 8.5 months.⁸

The EEOC has estimated that the average time to process a charge is about 25 months.⁹ As of June 30,

⁷ See Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts, Basic Patterns of Union Contracts*, 8th Ed., 1975, pp. 32-33.

⁸ Davis and Pati, "Elapsed Time Patterns in Labor Grievance Arbitration: 1942-1972," 29 ARB Journ. 15, 21 (March 1974).

⁹ Government Accounting Office Report, *op. cit.*, at p. D-3.

1975, EEOC's backlog of open charges totalled 126,340 charges, some of which date back to 1968. The GAO study ¹⁰ summarized as follows the charges pending in 1975 to show the length of time which charging parties have had to wait for their charges to be resolved:

<u>"Fiscal year in which charge was filed</u>	<u>Number of open charges</u>
1968	2,213
1969	3,260
1970	4,245
1971	5,917
1972	8,114
1973	18,550
1974	30,812
1975	46,919
Unspecified	6,310
Total	<u>126,340 "</u>

The availability of the grievance-arbitration machinery, with the union presenting and supporting the grievance, has other advantages. First hand familiarity of union representatives with employer practices over the years often results in the availability of evidence to support the grievance, which an outside government investigator might never, or only belatedly, discover. The tradition of the union membership in upholding the union side of the collective bargaining agreement by enforcing strict employer obedience to the spirit as well as the letter of its substantive terms, observance of time limitations, disclosure of relevant data and compliance with awards, places the grievant in a position of employee support in the shop, which cannot be obtained by any other procedure to remedy discrimination.

¹⁰ *Id.*, p. D-3.

Congressional intent to promote resolution of discrimination charges by solutions voluntarily devised by the affected parties would be defeated if this best of all voluntary methods must be impeded by denial of tolling, even when all parties desire to proceed with the grievance and arbitration procedures without first resorting to EEOC.

B. Employers Have a Stake in Resolution of Discrimination Issues Through the Grievance-Arbitration Procedures

In recent months a number of management spokesmen ¹¹ have joined with union ¹² and government re-

¹¹ Robert E. Jackson, labor counsel for St. Regis Paper Company, speaking at the Federal Bar Association's First National Conference on Equal Employment and Collective Bargaining, suggested that by encouraging an employee to grieve and pursue arbitration, the employer will become aware of "what is going on in the shop" and will have the opportunity to correct any discriminatory practices of its managers on its own, "without the participation of outsiders, such as EEOC." In addition, Jackson said, the costs to the employer will be less and it will get a decision more quickly by using arbitration. He stated that even if the grievant loses and proceeds to litigation, it is likely that any court would uphold the arbitral decision if the four standards set forth by the Supreme Court in *Gardner-Denver* have been met. Bureau of National Affairs, Daily Labor Report, No. 112, p. A-12, A-13 (June 9, 1976).

Lee C. Shaw, Chicago labor counsel for many employers, speaking to the annual meeting of the National Academy of Arbitrators, said "I do not think it is practical to separate the problems involved in the private arbitration of discrimination cases and the future of private labor arbitration. The sheer volume of discrimination claims and the imperative need to resolve them as expeditiously as possible requires an analysis of what the private arbitrators can do and should do to help solve these critical social as well as labor problems." Daily Labor Report No. 98, p. E-1 (May 19, 1976).

¹² James Yeungdahl, general counsel for the International Woodworkers of America, AFL-CIO, speaking at the Federal Bar As-

presentatives¹³ in an effort to assure the continued availability of grievance-arbitration procedures for resolving allegations of discrimination because of race, national origin, religion, color or sex. These management representatives emphasize the advantage in terms of securing solutions that will prove workable by having the problems tackled in a systematic and constructive manner by those familiar with the employer and its work force. In addition they see the number of discrimination cases as so great that they will flood the administrative agencies and courts, with attendant delays, greater cost and unstable employee relations prolonged.

All these considerations support the need for tolling.

sociation Conference (fn. 11, *supra*) reported on the success of an arrangement in Arkansas between a Woodworkers local and the Weyerhaeuser Co. in which arbitration has become the primary method of resolving discrimination allegations raised by female and minority-group employees. Although the arrangement has not led to any substantial back pay awards, Youngdahl said that the working conditions for women and minorities had improved since its inception.

Youngdahl contended that the legal profession has ignored "the fact that there is a major inadequacy on the part of judges who hear Title VII cases," and claimed that arbitrators could perhaps do a better job in such cases. Daily Labor Report No. 112, p. A-4 (June 9, 1976). The Amalgamated Clothing Workers, AFL-CIO has likewise adopted a program for use of grievance and arbitration procedures to correct discrimination because of race and sex. Hammerman and Rogoff, How to Live With Title VII: An Opportunity for Unions, 2 Employee Relations Law Journal 19, 21 (1976), which updates the article by the same authors cited in the IUE's main Brief, pp. 20, 24.

¹³ Herbert Hammerman, Special Assistant to the Director of Compliance Programs (Industrial Relations, likewise participated in the above mentioned (fn. 11, *supra*) Federal Bar Association Conference and urged the use of grievance-arbitration procedures to resolve discrimination issues. See also the articles authored by Hammerman and Rogoff, fn. 12, *supra* and IUE main brief, pp. 20, 24.

C. Since All Time Limits for Processing of Grievances Depend on the Consent of the Employer, the Employer Can Prevent Long Drawn Out Grievance and Arbitration Procedures

Robbins & Myers, (Br. pp. 20-23) argues to this Court that long delays in the processing of grievances occur and the time for filing of charges under Title VII will fluctuate to the disadvantage of employers. Robbins & Myers is a party to a contract which fixes precisely very short periods of time for both parties in the grievance procedure so that the maximum time between the filing of the grievance and the referral to arbitration is 31 days (App. 35a-36a). Indeed the elapsed time between the discharge of Guy and the completion of the third and last step of the grievance procedure was 24 days (App. 17a-19a). In conjecturing about the possibilities of long-drawn-out grievance and arbitration procedures, Robbins & Myers is raising an issue not present in this case.

Furthermore, the statistics on the prevalence of precise and very short time limits on the steps of the grievance-arbitration procedure, make unlikely any substantial incidence of the problem that Robbins & Myers states will exist if tolling is permitted. And since all time limits depend on the agreement of the employer, by refusing to agree to procedures for grievance and arbitration without short specific time limits, employers have it within their power to prevent this problem from ever arising.

In no sense does the absence of time limits, or the presence of unduly long time limits, operate to deprive an employee of any right to file and process a charge with the EEOC. We have never suggested that either the presence or use of a grievance-arbitration proce-

dures should operate to delay for a minute the filing by any employee of any charge with the EEOC any time the employee desires to file a charge.

D. Guy's Grievance Alleging "Unfair Action" by Robbins & Myers Is Broad Enough to Raise the Issue of Any Departure From Equality, Including Discrimination Because of Race

Guy's grievance made no mention of race but merely protested "unfair action" by discharging her (App. 18a). Robbins & Myers argues (Br. p. 24, fn. 20) that in labor relations an allegation of "unfair action" against an employer "customarily connotes conduct disparaging to an employee because of his status as a union member or supporter." For this proposition, Robbins & Myers cites two cases, one decided in 1908 and the other in 1946. Undoubtedly, the words "unfair action" are broad enough to include any discrimination because of union activity, although the present practice of all informed union representatives is to specify by use of the word union any unequal treatment because of union membership or activity.

It is much more usual to use the words "unfair action" to refer to unequal treatment of employees, such as the application of stricter standards to some employees than to others. Arbitrators enforce uniformity as part of the common law of the shop. This principle is stated by the Elkouris as follows:¹⁴

"It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be

¹⁴ Elkouri and Elkouri, *How Arbitration Works*, 3rd Ed. 1974, pp. 643-644.

treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment (such as different degree of fault or mitigating or aggravating circumstances affecting some but not all of the employees)." (Footnote omitted)

In proving lack of uniformity, although the evidence may be gathered merely to show that the employer has acted inconsistently, the evidence may well give rise to an inference of preference based on sex or race.

Guy's charge was adequate to bring into the grievance and arbitration procedure all issues of discrimination against Guy because of race.

E. Since Procedural Issues Equally With Substantive Issues Arising in Connection With the Processing of a Grievance Are Properly for Decision by the Arbitrator Unless Expressly Excluded, the Long Delays for Court Proceedings Upon Which Robbins & Myers Relies to Militate Against Tolling Are a Rarity, Except for Employers Who Resist Arbitration

In the *Steel Trilogy*¹⁵ this Court obliterated the lines between substantive and procedural issues and held that both types of issues were properly for decision by the arbitrator in the absence of express language withholding the issue from the arbitrator. In all grievances by employees which could be the basis of Title VII charges, there will be no litigation over arbitrability unless the employer opposed arbitration. With control over litigation about arbitrability entirely within the control of the employer, the employer risks

¹⁵ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

nothing due to the possibility of litigation to enforce arbitration.

Since the *Trilogy* decisions suits to enforce arbitrability have become rare. The concern of Robbins & Myers that long delays while issues of arbitrability are determined will inequitably lengthen the tolling period, posit the extremely rare and unusual situation, and one which the employer can avoid by allowing arbitrability to be determined by the arbitrator.

CONCLUSION

For the reasons stated in our main brief, in this reply brief and in the briefs filed by Guy, the decision of the Court of Appeals should be reversed.

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